LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
FEB 8 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 27

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC., and
MONTGOMERY WARD & CO., INC.,
Respondents.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,
Respondent.

PETITION FOR REHEARING.

EDWARD R. JOHNSTON,
JAMES A. SPROWL,
EDWARD H. HATTON,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 27

HONORABLE WALTER J. LA BUY,

Petitioner,

vs.

HOWES LEATHER COMPANY, INC., and MONTGOMERY WARD & CO., INC.,

Respondents.

HONORABLE WALTER J. LA BUY,

Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,

Respondent.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully requests a rehearing in the above entitled proceeding, and in support thereof shows as follows:

The majority opinion opens wide the door to litigants desiring review of interlocutory orders; and clearly permits, if not actually invites, scrutiny and expungement by mandamus of every interlocutory order of a District Court

which the Court of Appeals may feel is in violation of the "rules" and an abuse of discretion. Such review will furthermore be possible in every case where the final decree, when entered, will eventually be subject to review by the Court of Appeals. The majority rejected the view, announced in many previous cases, that such review of an interlocutory order is permissible only when review by appeal would *otherwise be frustrated,* and said instead: "Since the court of appeals could *at some stage of the anti-trust proceedings entertain an appeal* in these cases, it has power in the proper circumstances as here to issue writs of mandamus reaching them." (Emphasis supplied) (Majority Opinion, pp. 5-6). This is very broad language.

Since most procedural matters are now governed by the rules, and since the final judgment or decree in nearly every District Court case is eventually reviewable by the Court of Appeals, the majority opinion encourages the filing of petitions for mandamus to review interlocutory orders involving application of "rules" in all kinds of cases,—criminal as well as civil, since criminal as well as civil procedure is now governed almost wholly by "rules."

In bidding the Courts of Appeal to embark on this course of interlocutory review, this Court appears to be usurping powers expressly reserved to the Congress by the Constitution.

The powers of the Circuit Courts of Appeal derive solely from statute; and the appellate powers of even this Supreme Court are "* * * with such exceptions, and subject to such Regulations as the Congress shall make." Art. III, Section 2, United States Constitution.

Congress has enacted statutes providing that Courts of Appeal shall review only final orders (except for a very

few enumerated interlocutory orders which do not embrace the order here reviewed). 28 U.S.C. 1291, 1292. By these statutes a very sensible policy is established, and a regulation is laid down, which policy and regulation this Court is, according to the Constitution, bound to follow. Yet the majority opinion does not do so, but instead sets it aside and permits review of a host of interlocutory orders by mandamus. Historically, review of such interlocutory orders by mandamus has been to confine the lower court to its jurisdiction, or to prevent the lower court from frustrating review, as by refusing to sign a bill of exceptions, or some such act. See *Ex Parte Peru*, 318 U.S. 578, 63 Sup. Ct. 793, where this Court said that mandamus could be constitutionally issued "* * * only insofar as such writs are in aid of its appellate jurisdiction;" and *McClellan* v. *Carland*, 217 U.S. 268, 30 Sup. Ct. 501, where this Court said: "But we think it the true rule that where a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of the appellate jurisdiction *which might otherwise be defeated by the unauthorized action of the court below*" (Emphasis ours); and *Ex Parte United States*, 287 U.S. 241, 53 Sup. Ct. 129, where this Court said that since *Marbury* v. *Madison*, to authorize mandamus, "* * * it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable the court to exercise its appellate jurisdiction." Mandamus has been used in criminal cases, where an acquittal would preclude any review; to order the certification of a record to permit review; to order the entry of a final decree to permit review, and the like. This Court said in *Maryland* v. *Soper*, 270 U.S. 9, 29, 46 Sup. Ct. 185, "Mandamus * * * does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially

where in regular course the decision may be reviewed upon writ of error or appeal."

This is what Congress necessarily had in mind in authorizing the Courts, by the All-Writs Act, to issue mandamus and other writs: "* * * in aid of their respective jurisdictions." The courts were to issue the writs only if necessary to insure a review,—to aid or assist in securing review,—but never to control a trial judge's discretion.

In *Life and Fire Insurance Co. of New York* v. *Heirs of Wilson*, 8 L. Ed. 949 (1934), this Court held: "On a mandamus a superior court will never direct in what manner the discretion of an inferior court will be exercised; but they will, in a proper case, require an inferior court to decide." This principle is abandoned by the majority opinion in the present case.

The majority opinion further states that the writ of mandamus may not only be withheld if the court, in its discretion, decides to withold it, but that it also may be *granted* in any case at the court's discretion. Previously this Court held that, like certain equitable remedies, mandamus might at the court's discretion be withheld even where a legal showing was made for it. See *U. S.* v. *Dern* (1933) 289 U.S. 352, 53 Sup. Ct. 614, where this Court said of mandamus: "* * * its allowance is controlled by equitable principles * * * and it may be refused for reasons which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right." While the court may have the right to withhold the writ in its discretion, and has frequently so stated, it may not issue the writ unless authorized by the Constitution or by statute to do so.

Whether review should be immediate or await final decree is an important policy matter. Interlocutory re-

view, while sometimes avoiding a retrial, is nevertheless disruptive and conducive to gross delays. It is akin to "back seat driving," and can prove equally upsetting. The Congressional policy of deferring review until final decree is a thoroughly considered and wise policy, and should not be overthrown by this Court, even if this Court had the power so to do. But, under the Constitution, this Court does not have that power, and this Court should not assume it by sheer assertion.

If the majority opinion stands, the Courts of Appeal may well be deluged with petitions for mandamus seeking the expungement of distasteful interlocutory orders, relating to venue, discovery, depositions, change of forum, evidence, severance, references, pleadings, amendments, intervention, granting of new trials, and a myriad of other contested questions presently governed by the civil or criminal rules.

We search the statutes in vain to find where Congress has conferred on the Courts of Appeal "supervisory control of the District Courts," as is asserted by the last paragraph of the majority opinion. From what statute does such power derive? This Court cites none. The only statute we can discover which might have any bearing is Title 28, Section 332 of the United States Code, which creates a Judicial Council consisting of the chief judge and circuit judges of each circuit, and provides that the council shall meet as such twice a year, and "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."

The orders of the Judicial Council are limited to those relating to "administration of the business" of the courts; this statute cannot possibly authorize review of

any "judicial" act of any judge. This statute certainly does not confer on the Court of Appeals the right to set aside interlocutory orders of the District Courts by mandamus. Whether or not "supervisory control over the District Courts," is either desirable or "necessary to proper judicial administration in the federal system," it can exist in the Courts of Appeal only to the extent that Congress has provided by statute.

We further urge the court to reconsider its harsh judgment that petitioner, Judge La Buy, "abused his discretion" in making a general reference of these fantastically complicated cases. This case, by its very nature involving as it does 87 plaintiffs and 6 defendants, and comparable charges of price discrimination, requires the trier of the facts to make an account of hundreds of sales transactions before the question of liability can be resolved. Therefore, it appeared to the respondent that the case came within the scope of Rule 53(b) because it involved accounting. Perhaps this Court would have decided the matter differently, but the matter fairly lay within the trial judge's discretion, and his exercise of that discretion should not have been arbitrarily overruled. If this was an "abuse of discretion" then respondent really had no discretion and the term becomes meaningless.

Rule 53(b) is completely emasculated by the Court's opinion; the court gives no light on its meaning. Are there any "exceptional conditions" which will justify a general reference? If any exist, they are not even vaguely delineated. (See Petitioner's brief, pp. 17-18).

This rspondent respectfully urges this Honorable Court to interpret and define Rule 53(b) for his future guidance as well as that of all other judges of the United States District Courts.

For the foregoing reasons, petitioner respectfully requests a rehearing.

Respectfully submitted,

EDWARD R. JOHNSTON,
JAMES A. SPROWL,
EDWARD H. HATTON,
Attorneys for petitioner.

CERTIFICATE OF COUNSEL.

JAMES A. SPROWL, one of the attorneys for petitioner in the above entitled cause, does hereby certify that the foregoing annexed Petition for Rehearing is filed in good faith and not for purposes of delay.

JAMES A. SPROWL